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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 424

JAMES E. McDANIEL,

Petitioner,

—against—

M/S LISHOLT, her engines, etc., and
A/S LISE her owner,

Respondents.

BRIEF OF RESPONDENT A/S LISE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION OF THE COURT BELOW

The citation of the opinion appealed from is 257 F. 2d 538.

JURISDICTION

The Petition presents no basis for the exercise of this Court's discretionary jurisdiction. Conflicts are not shown. Petitioner's arguments consist of little more than oblique attacks on findings of fact already resolved against him.

QUESTIONS PRESENTED

Petitioner's preamble to his "Questions Presented" misreads or misconstrues the opinion of the Court of Appeals in two glaring respects. (a) Petitioner says (p. 2) that the

Court of Appeals held "Since petitioner was a fireman by calling he could not recover on the ground of the owner's negligence." Actually, the Court of Appeals and the District Court held that there was no showing of a breach of the limited duty owing to a professional fireman, and therefore no negligence.

(b) Petitioner says (p. 3 and again on p. 6) that the Court of Appeals held the shipowner owed no duty to petitioner other than "to refrain from the infliction of wilful or wanton injury". The opinion of the Court of Appeals (Petition p. 15) reveals how transparently petitioner interrupted the Court below in mid sentence. Petitioner omits "and to exercise ordinary care to avoid injuring the fireman by any affirmative and active acts of negligence."

Having had his libel dismissed in the District Court, and that dismissal unanimously affirmed, petitioner now addresses himself at this eleventh hour to this Court's discretionary power of relief. It ill becomes him to do so with less than complete candor.

So too, petitioner's questions are valueless. They contain a premise of fact non-existent in any of the findings of the District Court, as affirmed by the Court of Appeals. Petitioner assumes he was "assisting stevedores in unloading stores." Findings 17, 18, 37, 38 and 39 (pp. 15a-16a and 20a) show petitioner's functions, purposes and authority in being aboard the m/s Lisholt as a member of the Panama Canal Zone Fire Department, none of which had anything to do with assisting stevedores.

Respondent submits the following questions as truly representative of the issues herein and notes in so doing that petitioner has said p. 3 "There was no controversy in respect to the facts."

1. Whether a shipowner warrants the seaworthiness of its vessel to a member of a public fire department where

(a) it has been found as a fact that a fireman comes aboard the vessel by virtue of the police power of the sovereign irrespective of the consent or authorization of the shipowner (Findings 17, 18, 37, 38 and 39; pp. 15a-16a and 20a)

(b) it has been found as a fact that the fireman is not performing a ship's service but rather one to the public (Finding 38; p. 20a)

(c) it has been found as a fact that very purpose for the fireman coming aboard an admittedly unseaworthy vessel following a disastrous fire was to make the inspection designed to discover the condition which resulted in his injury (Finding 37; p. 20a)

(d) it has been found as a fact that following the fire the vessel was "an unseaworthy hulk" incapable of navigation (Finding 38; p. 20a).

2. Whether a fireman in pursuit of his profession on a vessel is to be regarded as a business invitee when, if engaged in the same activity on land, he would be looked upon, by the overwhelming weight of authority, as a licensee.

3. Whether even if held an invitee the District Court's Findings and Conclusions preclude recovery where (a) petitioner's purpose in being aboard the vessel was to make the very inspection designed to discovery the condition that injured him. (Findings 17, 18 and 37; pp. 15a, 16a and 20a; Conclusion of Law 7, p. 25a) and (b) where petitioner as a fireman assumes the ordinary risks of his calling *viz.* the dangers of discovering hidden or undetected fires (Findings 17, 18 and 37; pp. 15a, 16a and 20a; Conclusion 8, p. 27a).

STATEMENT OF CASE

Petitioner states that there was no controversy with respect to the facts. The facts were found by the District Court and are thirty-nine in number and occupy eleven pages of petitioner's appendix below.

When such detailed and comprehensive findings are restated in summary form in three pages of the Petition herein, opportunities abound for wholesale omissions, abridgements, distortions and unsupported inferences. For example it is implied (p. 3) that at 8 A. M. on February 6, 1954 all members of the Fire Department left the vessel. This is contrary to Findings 7 and 17 of the District Court (pp. 11a, 12a and 15a) which show that the majority of firemen left at 9:30 A. M. and that thereafter one or two firemen were aboard all day.

Further out-of-context recitals appear when petitioner mentions only the inspections and activities of the crew. Overlooked are:

(1) The fact that an inspection was made of the refrigerating space area between 8 and 9:30 A. M. by the fire department (Finding No. 8, p. 12a).

(2) The Chief Steward and Chief Cook thought that the smoke or gas they encountered between 9 and 10 A. M. in the morning of February 6 was a residue of the fire (Finding 9, p. 12).

(3) That at about 11:30 A. M. an official of the Terminals Division of the Panama Canal Company and a stevedore sub-foreman entered the outer refrigerating box and noted only a slight refrigerant odor (Finding 12, p. 14a).

(4) That at 2:30 P. M. a stevedore sub-foreman entered the inner refrigerator box and reported only that the meat was as hard as a rock (Finding 15, p. 15a).

(5) That the Terminal Division official previously mentioned had been assured by the Fire Department everything was all right (Finding 12 p. 14a).

(6) That no one, whether Fire Department members, representatives of the Panama Canal Company or ship's personnel knew or suspected a smouldering within the walls of the refrigeration rooms (Findings 31 through 36, p. 19a).

(7) That the fireman whom petitioner relieved at 4 P. M. told him all was quiet (Finding 17, p. 15a).

(8) That no danger was suspected until some time after 4:30 P. M. (Finding 20, p. 16a).

Petitioner closes his "Statement of Case" by attempting to have this Court draw an inference that smoking touched off the explosion which on the testimony, and particularly on petitioner's contrary testimony, which inference the District Court found impossible to draw (Finding 25, pp. 17a-18a). Finding 25 notes that petitioner denied seeing anyone smoking or lighting cigarettes. No crew members were present at the time (Finding 30, p. 18a). The Chief Steward and Chief Cook both had left the area before the explosion (Finding 16, p. 15a). Furthermore most of petitioner's references are to the original testimony rather than to the findings based on the original testimony.

As with his "Questions Presented" petitioner's "Statement of Case" unfortunately cannot be relied upon as a factual preparation for petitioner's discussion of law to follow. It is particularly distressing to respondent to find it necessary to encumber its brief with refutations of petitioner's view of the facts, especially when petitioner says here, as he did in the Court of Appeals, that "There was no controversy in respect to the facts".

Respondent believes that petitioner's "Statement of Case" is of no value whatsoever and urges the Court to

refer only to the 39 Findings of Fact made by the District Court (10a-20a). None of these were found clearly erroneous, arbitrary or without basis in evidence by the Court of Appeals.

POINT I

NO WARRANTY OF SEAWORTHINESS IS OWED TO PETITIONER, A MEMBER OF A PUBLIC FIRE DEPARTMENT BECAUSE:

1. *It has been found as a fact that petitioner was not aboard the vessel by contract, arrangement or consent of the shipowner either directly with him or indirectly through petitioner's employer* (Findings 17, 18, 19 and 38, pp. 15 to 16a and 20a).

In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, p. 95, this Court pointed out that the warranty of seaworthiness:

> "* * * is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his *consent or by his arrangement.*" (Emphasis supplied)

At page 96 this Court said:

> "Not the owner's consent to liability, but his consent to performance of the service defines its boundary".

Again at page 97 this Court said:

> "Accordingly we think the Court of Appeals correctly held that the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent."

Respondent could hardly be said to have consented to the presence of petitioner aboard the vessel when it has been found as a fact that its consent could not be with-

held and respondent has not power to exclude libelant from the vessel for his own safety (Findings 38 and 39, p. 20a). Fire Chief Burke called as an expert witness by respondent herein, testified (Record 179) as to the police powers of a Fire Department. This authority is explicitly set forth in the Rules and Regulations Governing Navigation in the Panama Canal and Adjacent Waters, § 9.3 (Rule 97, as amended by E. O. 9227 of August 19, 1942; 35 C. F. R. 4.136).

In *Kermarec* v. *Compagnie Generale Transatlantique*, (2 Cir.) 245 F. 2d 175 cert. granted 355 U. S. 902, relied on by petitioner, the shipowner could have excluded the injured man from the vessel.

2. *It has been found as a fact that petitioner was not performing a ship's service.* Whether or not petitioner was performing a ship's service is a question of fact. There have been findings of fact in this case (Findings 17, 18 and 38, pages 15a-16a and 20a) that libelant was aboard the vessel in the primary interest of the public, performing duties traditional or customary for firemen following a fire. He was not performing any traditional or customary activity of the crew (Court of Appeals opinion p. 14, petitioner's brief).

Petitioner now characterizes these findings of fact as "arbitrary and without evidence to support them". This is an extraordinary statement in view of petitioner's own statement of "no controversy" as to the facts and also because the Findings themselves explicitly set forth the evidence and testimony relied on by the District Court to show that petitioner's functions, authority and purposes in being aboard the m/s Lisholt were peculiarly those of a fireman. The distinction sought to be drawn between fireman and fire watchman was rejected by the District Court as of no significance (Finding 18, p. 15a-16a).

There is no doubt from the previously quoted language from *Sieracki* supra, that to qualify for the warranty of seaworthiness the individual must somehow be in the ship's service in addition to being aboard with the owner's consent.

Petitioner nevertheless contends that the Court of Appeals decision is in conflict with *Seas Shipping Co. Inc.* v. *Sieracki* 328 U. S. 85 and *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 as to the scope of the warranty and implies that the Second Circuit is still following *Guerrini* v. *United States*, 167 F. 2d 352, (1948) in determining who may qualify. That this is not so is manifest from the language in *Halecki* v. *United N. Y. & N. J. S. H. P. Ass'n*, 251 F. 2d 708, 711 cited by petitioner.

In limiting the warranty of seaworthiness to those who perform a ship's service with the ship's consent, the Court of Appeals for the Second Circuit is in complete accord with the language of *Sieracki* rather than in conflict with it.

Petitioner cites a conflict between decisions in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 in the Second Circuit. *Read* v. *United States*, 201 F. 2d 758 in the Third Circuit as grounds for granting certiorari herein. What petitioner overlooks is that this very conflict was raised in the *Berge* case on pages 6 and 8 of Berge's petition for certiorari therein and certiorari was denied by this Court 356 U. S. 958. If this Court deemed the conflict was insufficient to grant certiorari in the *Berge* case itself, it is difficult to appreciate how it can be of greater importance in the within case.

Recently this Court has denied certiorari in a number of these cases where the warranty of seaworthiness was sought, to be extended to shore repairmen. In each it was held that the man was not performing a traditional seaman's service. The first two cases occurred in drydock and the latter while the vessel was moored alongside a pier. See *Berryhill* v. *Pacific Far East Line*, (9 Cir.) 238 F. 2d 385, cert. den.

354 U. S. 938 (1957); *Raidy* v. *United States* (4 Cir.) 252 F. 2d 117, cert. den. 356 U. S. 973 (June 2, 1958); *Berge* v. *National Bulk Carriers Corp.* (2 Cir.) 251 F. 2d 717, cert. den. 356 U. S. 958 (May 19, 1958). The ship repairman in each, unlike petitioner here, was an invitee aboard the vessel by some consent, contract or arrangement with the shipowner, but found not entitled to the warranty because he still was not engaged in traditional seaman's work. Thus, against petitioner's argument that the Second Circuit has unduly limited the warranty of seaworthiness it is only necessary to show the uniformity of decision among the various Courts of Appeal and the consistent denial of certiorari by this Court.

The rationale for this line of cases is found in *Atlantic Transport Co.* v. *Imbrovek* 234 U. S. 52, 61 which provided much of the underlying philosophy for this court's decision in *Sieracki*, 328 U. S. 85, 97 extending the warranty of seaworthiness to longshoremen. In *Imbrovek* this Court pointed out, page 62, that formally the work was done by the ship's crew, but a specialized service had developed, as this Court agreed upon a class as "clearly identified with maritime affairs as are the mariners". It would indeed be stretching a point to say that a fireman in petitioner's capacity belongs to a class "as clearly identified with maritime affairs as are the mariners".

There is little question that the Courts have restricted the warranty of seaworthiness to those who meet the criteria set forth in *Sieracki* and following decisions. Those who do not qualify are not entitled to the warranty, however humanitarian it might be to have them awarded recompense for injuries suffered. This Court pointed out in the *Sieracki* opinion, 328 U. S. 85, 95:

> "It is a form of absolute duty owing to all *within the range* of its humanitarian policy". (Emphasis supplied)

This is limiting language.

3. *It has been found as a fact that petitioner's very purpose in being aboard the vessel was to seek out and discover hidden and undetected fires, the very condition resulting in his injury* (Finding 17 and 37, p. 15a and 20a). A logical and well recognized exception to the warranty of seaworthiness is that it has no application to those who come aboard a vessel seeking to repair, eliminate or inspect for an unseaworthy condition (Conclusion 6b) and are injured by reason of that very condition. *Bruszewski* v. *Isthmian Steamship Co.* (3 Cir.) 163 F. 2d 720; *Byars* v. *Moore-McCormack Lines, Inc.* (2 Cir.) 155 F. 2d 587; *Filipek* v. *Moore-McCormack Lines,* (2 Cir.) 258 F. 2d 734.

4. *It has been found as a fact that the vessel was an "unseaworthy hulk" incapable of navigation.* It was a finding of fact that the vessel's engine room and superstructure were burned out, that it had no motive power to navigate, light, heat, cook or refrigerate, that it was listing, with water in its compartments and engine room and that the will of the sovereign had been superimposed on its own disclipine (Finding 38, p. 20a).

The warranty of seaworthiness should not be imposed on a vessel in such circumstances as it was not in navigation. *West* v. *United States,* 256 F. 2d 671.

POINT II

A FIREMAN BY THE OVERWHELMING WEIGHT OF AUTHORITY IS DEEMED TO BE A LICENSEE ON PREMISES WHERE HE IS PURSUING HIS PROFESSION. IT IS THE FINDING OF THE DISTRICT COURT THAT RESPONDENT BREACHED NO DUTY OWING TO PETITIONER EITHER AS A LICENSEE OR SUI GENERIS.

As previously pointed out petitioner twice misquotes the definition of licensee given by the Court of Appeals

herein (p. 3 and 6 petition). No argument is made however that the District Court or Court of Appeals erred in finding no breach of any duty owed a licensee.

Findings 28 through 36 p. 18a-19a confirm that there was no activity by respondent which would constitute a breach of duty owed to a licensee or even if a fireman be viewed as *sui generis* in a privileged person category. (District Court opinion p. 26a-27a).

Petitioner's only argument is that he was not a licensee and it was arbitrary for the Courts to so hold. Petitioner cites no statutes, decisions or policy for this assertion and seeks only to tie himself to the coat tails of *Kermarec* v. *Compagnie Generale Transatlantique*, 245 F. 2d 175 cert. granted 355 U. S. 902 currently pending before this Court.

The overwhelming weight of authority in this country is that a fireman, a member of a public fire department, in this discharge of his duty is a licensee. 2 Harper & James, The Law of Torts (1956) section 27.14 subsection 2.65; Corpus Juris Secundum § 34 p. 490, p. 493; 13 A. L. R. 633; 141 A. L. R. 580. Prosser Handbook of The Law of Torts (1955) Sec. 78 p. 461.

All the policy reasons for designating firemen as licensees on land apply equally well on sea. The fireman may board the vessel without the consent or invitation of the owner. He may take charge and control of the premises. The interests of the public are best served by having the fireman assume the risk of the fire and its consequences than having the owner of the premises, faced with damage suits by injured firemen, have an economic deterrent for not reporting fires or attempting to cope with them unaided. Police or firemen are permitted to enter premises or portions thereof without warning. the owners are deprived of opportunities to make conditions safe for their entry.

POINT III

EVEN VIEWED AS AN INVITEE THE FINDINGS BELOW PRECLUDE RECOVERY BECAUSE PETITIONER WAS INJURED BY A CONDITION HE WAS ABOARD TO INVESTIGATE AND BECAUSE AS A FIREMAN HE ASSUMED THE RISK OF FIRE AND ITS CONSEQUENCE.

Even if the Findings of the District Court be totally disregarded and it be assumed, contrary thereto (Findings 18 and 38 p. 15 and 20a), that petitioner was aboard at the invitation or consent of the shipowner and was therefore an invitee he is still precluded from recovery because Findings have been made (17, 18, 37 and 39, p. 15a-16a and 20a) showing that he was that unique type of visitor whose purpose in being aboard was to make the inspection designed to discover the condition that injured him. Thus it becomes ludicrous to say that the vessel had a duty to inspect for hidden fires aboard the vessel in order to advise petitioner of their existence so that when petitioner undertook his inspection for hidden fires he might be assured he would not find any.

Another way of stating this is to say that petitioner assumed the usual risks of his calling. The District Court carefully pointed out that while the defense of assumption of risk is not generally applicable to maritime torts it does apply to risks which one's calling requires one to face. What is ordinary to one calling may of course be unusual or unwarranted to another. It has been found as a fact that libelant's calling required him to make an inspection of the vessel for hidden fires and undetected smoulderings or any rekindling of the major blaze. (Finding 17 and 18 conclusion of law 8, pages 15a-16a and 27a). He was injured by one of the very hazards or dangers he was called upon to investigate and not by some unrelated condition. Not only did petitioner in a general way assume the risks

of fire and its consequences but specifically did so herein. He was fully conscious of the danger of explosion when he returned to the refrigerating rooms to investigate the cause of gas and possibly to attempt eliminations (Findings 28-29 p. 18a). All this was part of his job as fireman. If he were not a fireman and a representation of the Canal Zone Fire Department on the vessel he would not have been asked by the stevedore foreman to make the inspection and if he were not a fireman he need not have done so even if asked.

With perspicacity the District Court noted (pp. 26a-28a) that no duty to inspect was owed to petitioner not only because he was a licensee, but because he was the inspector and further even if considered a higher order of visitor than licensee he assumed the usual risks of his calling. Thus petitioner's claim to a recovery as an invitee was anticipated, considered and rejected by the District Court on the foregoing analysis.

CONCLUSION

The petition establishes no conflict in decisions and is principally concerned with arguing facts already resolved against petitioner. It should be denied.

Respectfully submitted,

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